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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: JUN 22 2011 Office: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a lead research specialist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, counsel submits a brief and resubmits previously submitted evidence. The petitioner must demonstrate eligibility as of the date of filing.[1] *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). At the time of filing, the petitioner, while possessing what purports to be a foreign medical degree, was pursuing a Master's degree in Health Policy and Management at [redacted]. Also as of that date, the petitioner had two published abstracts and no published articles. Even as of the date of appeal, the petitioner's publication record is minimal. Significantly, all of the letters are from individuals currently or previously affiliated with [redacted]. Moreover, these references merely discuss the importance of the petitioner's area of research and his value to his ongoing project without identifying any past accomplishments and explaining their influence in the field. For these reasons, discussed in more detail below, the record contains no persuasive evidence demonstrating that a waiver of the alien employment certification process would serve the national interest in this matter.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --
>
> > (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.

[1] "Prior counsel" refers to the the attorney who represented the petitioner initially and in response to the request for additional evidence while "counsel" refers to the attorney who represents the petitioner on appeal.

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director accepted that the petitioner was a member of the professions holding an advanced degree. The AAO, however, conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner submitted two diplomas, neither of which states the length of the programs the petitioner completed. The petitioner received a diploma conferring a Bachelor of Art qualifying him as an expert of antiquity from the [redacted]. The diploma indicates the petitioner completed the program in 1999. The second diploma, from the [redacted] states that, three years later in 2002, the petitioner completed a course in general medicine qualifying him as a "physician." The petitioner did not submit an evaluation of either diploma. Thus, the petitioner has not established that his 2002 diploma is a foreign equivalent degree to a U.S. medical degree as claimed.

As the petitioner has not documented that he has a U.S. academic or professional degree or a foreign equivalent degree above the baccalaureate level, he has not established his eligibility for classification as a member of the professions holding an advanced degree. The petitioner has never claimed to be an alien of exceptional ability or submitted evidence relating to the regulatory criteria set forth at 8 C.F.R. § 204.5(k)(3)(ii). Thus, the petitioner has not established his eligibility for the classification sought.

The remaining issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states, in pertinent part:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215, 217-18 (Comm'r. 1998) (hereinafter "NYSDOT"), has set forth several factors that U.S. Citizenship and Immigration Services (USCIS) must consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, the petitioner must show that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The use of the term "prospective" requires future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The AAO concurs with the director that the petitioner works in an area of intrinsic merit, medical research, and that the proposed benefits of his work, improved understanding and treatment of adults and premature children with lung failure due to chronic exposure to alcohol, would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

Prior counsel initially focused on the importance of the petitioner's area of research and submitted multiple articles addressing Acute Respiratory Distress Syndrome (ARDS). Prior counsel then asserted that the petitioner's "record of past scientific discoveries" warranted a waiver of the alien employment certification. On appeal, counsel asserts that the temporary nature of the petitioner's position precludes Emory University from seeking an employment certification on behalf of the petitioner.

First, eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, U.S. Citizenship and Immigration Services (USCIS) generally does not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *NYSDOT*, 22 I&N Dec. at 218.

Second, prior counsel failed to identify the petitioner's "past discoveries." Instead, prior counsel asserted that the petitioner's alleged "record of past scientific discoveries" is evident from his development of "extensive expertise" in various procedures. Counsel advances a similar assertion on appeal. Job-related training in an important new method, however, cannot be considered to be an achievement or contribution comparable to the innovation of that new method. *Id.* at 221, n.7. It cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, the AAO notes that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

Finally, prior counsel fails to explain why [redacted]'s unwillingness to offer the petitioner a permanent job suggests that waiving the alien employment certification process is in the national interest. The petitioner's current nonimmigrant status allows him to complete his temporary position. Should [redacted] subsequently decide to offer the petitioner a permanent position to continue working on this project, it can seek alien employment certification at that time. USCIS does not dispute the advantage to an employer of retaining qualified staff rather than training inexperienced, newly hired workers. *Id.* at 222. The contention that no other experienced workers are available, however, should be tested on an application for alien employment certification. *Id.*

On appeal, counsel asserts that the petitioner "is the best candidate for this position because of his expertise and skills in the field – training a new US worker will be technically difficult and a set back in the Petitioner's research efforts." Counsel apparently means [redacted] when using the term "Petitioner." This proposition presumes that the alien employment certification process would require [redacted]o hire a U.S. worker that requires training and, thus, is not qualified for the position. An application for alien employment certification, however, allows an employer to list the required amount of education, experience, training and other skills required for the position. Simple exposure to advanced technology constitutes, essentially, occupational training which can be articulated on an application for alien employment certification. *Id.* at 221. As stated above, the issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

The cover letter to the original petition lists two published articles in *Medical View of XXI Century.* The petitioner did not submit these articles. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Moreover,

going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). Regardless, they relate to leukemia and antihypertensive treatments, areas in which the petitioner is no longer working.

The petitioner also submitted two unpublished manuscripts. In response to the director's request for additional evidence, the petitioner submitted two additional articles published after the filing of the petition. As stated above, the petitioner must demonstrate his eligibility as of the filing date. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). In this matter, that means that he must demonstrate his track record of success with some degree of influence on the field as a whole as of that date. All of the case law on this issue focuses on the policy of preventing petitioners from securing a priority date in the hope that they will subsequently be able to demonstrate eligibility. *Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Reg'l. Comm'r. 1977); *Matter of Katigbak,* 14 I&N Dec. at 49; *see also Matter of Izummi,* 22 I&N Dec. 169, 175-76 (Comm'r. 1998) (citing *Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981) for the proposition that USCIS cannot "consider facts that come into being only subsequent to the filing of a petition.") Consistent with these decisions, a petitioner cannot secure a priority date in the hope that his as of yet unpublished research will subsequently prove influential. Ultimately, in order to be meritorious in fact, a petition must meet the statutory and regulatory requirements for approval as of the date it was filed. *Ogundipe v. Mukasey,* 541 F.3d 257, 261 (4th Cir. 2008).

Regardless, the record contains no evidence, even on appeal, that these articles have been cited at a level consistent with any influence in the field. In fact, the evidence that appears to have been submitted to document citations actually documents two articles by the petitioner's supervisor in [redacted] that the petitioner himself has cited. A lack of citations does not preclude a finding that the petitioner has influenced the field. Nevertheless, it is the petitioner's burden to provide some type of evidence demonstrating such an influence.

The petitioner submitted two presentations with no evidence as to where the petitioner or a coauthor presented this work. The petitioner also submitted evidence of two abstracts for work the petitioner or a coauthor presented at two [redacted] While conference presentations demonstrate dissemination of the petitioner's work, the petitioner must demonstrate the influence of those presentations once disseminated. The petitioner did not submit citations or other evidence of independent researchers using the petitioner's work in their own work.

The petitioner submitted a September 2002 article in [redacted] reporting on a visit to the newly opened English language [redacted] medical school where the petitioner was "one of the best students in his class" who has published comprehensive research. The record contains no evidence regarding the distribution of this publication. Regardless, the article characterizes the petitioner as an "extremely perspective [*sic*] medical specialist" with a "great future" rather than someone who has already influenced the field. Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit.

NYSDOT, 22 I&N Dec. at 219, n.6. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Id.*

Finally, the petitioner submitted several letters from his supervisor at [redacted] and other individuals who are either currently or formerly affiliated with that university. [redacted] a professor of pediatrics [redacted] asserts that the petitioner has worked in her laboratory as of the summer of 2003. [redacted] explains that the petitioner has "developed extensive expertise in preparing and assessing lung injury by morphometric analysis." As stated above, simple training in advanced technology or unusual knowledge, while perhaps attractive to the prospective U.S. employer, does not inherently meet the national interest threshold. *Id.* at 221. While [redacted] asserts that these analyses are important to her study of the efficacy of antioxidant treatments and explains the potential reach of this study, she fails to explain how the petitioner's ability to prepare and assess lung injury has influenced the field to any degree. [redacted] concludes that the petitioner's research "will make a great contribution in our understanding and treatment of those with chronic exposure to alcohol." [redacted] does not, however, identify a past record of success with some degree of influence on the field as a whole.

While [redacted] discusses the value of the petitioner's skills to her project and the difficulties of training someone new, it remains that the petitioner is a student [redacted] with no documented prospect of a permanent job offer [redacted] laboratory. Thus, immigration matters aside, [redacted] does not explain how she would retain the petitioner's services in her laboratory once the petitioner graduates. [redacted] does not explain how the petitioner differs from other graduate students that a university laboratory is constantly training in laboratory techniques as part of the students' education.

[redacted], an associate professor at [redacted] explains that she collaborates with [redacted] in the study of maternal alcohol exposure and lung development in the newborn. [redacted] continues:

> In these studies, we have demonstrated that *in utero* ethanol impairs the function of the resident immune cell in the developing lung, and increases the risk of infection and systemic sepsis in the experimental animal. His work has lead to an important scientific advance as well as a manuscript currently in submission, where [the petitioner] is named a co-author. He has also been a co-author on five scientific abstracts with me that I have presented at international scientific meetings in this field.

[redacted] acknowledges that the petitioner's manuscript was unpublished. Thus, the petitioner cannot demonstrate the influence of this work. While [redacted] also references presentations, he does not explain how these presentations have influenced the field such that they are being applied by independent researchers.

[redacted], previously a professor at [redacted], asserts that the petitioner assisted [redacted] in his research into the functional features of the certain cells of the bronchial-associated lymphoid tissue of human fetuses "by conducting Enzyme Linked Immunosorbent assay (ELISA) and data processing." The petitioner's ability to provide ELISA and data processing services are skills that can be listed on an application for alien employment certification. [redacted] then goes on to discuss the importance of the petitioner's area of research. The issue is not whether treating ARDS is in the national interest but whether the petitioner, but whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with similar qualifications. *See id.* at 220. As stated above, the petitioner's technical skills, such as ELISA experience, are amenable to articulation on an application for alien employment certification. *Id.* at 220-21.

[redacted], a Research Specialist Supervisor at [redacted], merely asserts that the petitioner is proficient at "various laboratory research techniques including: cellular isolation and culture, cell line culture, enzymatic assays, immunofluorescent staining, and fluorescent microscopy." As stated above, any objective qualifications necessary for the performance of the occupation can be articulated in an application for alien employment certification. *Id.* at 220-21. Moreover, the issue of whether similarly-trained workers are available in the U.S. is an issue under the jurisdiction of the Department of Labor. *Id.* at 221.

[redacted] a research technical specialist at [redacted] discusses the petitioner's assistance with a visit from a native [redacted]. None of this discussion identifies any innovations by the petitioner or explains how he has influenced the field.

The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as this decision has done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

The letters considered above primarily contain bare assertions of valuable skills without specifically identifying innovations and providing specific examples of how those innovations have influenced the field. Merely repeating the legal standards does not satisfy the petitioner's burden of proof.[2] The petitioner did not provide any letters from independent experts. More significantly, the petitioner also failed to submit corroborating evidence in existence prior to the preparation of the petition.

Ultimately, the petitioner is a laboratory technician with some type of medical background who has learned valuable laboratory skills while pursuing his Master's degree. The record lacks evidence that the petitioner possesses any skills that are not amenable to articulation on an application for alien employment certification.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

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[2] *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Similarly, USCIS need not accept primarily conclusory assertions. *1756, Inc. v. The Attorney General of the United States,* 745 F. Supp. 9, 15 (D.C. Dist. 1990).